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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-713

CONTINENTAL CAN COMPANY, INC.,
Petitioner,

versus

L. L. BREWTON LUMBER COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The statement of the case contained in the petition of Continental Can Company, Inc., hereinafter referred to as "Continental," is essentially correct as far as it goes. This statement is made to supply certain important information.

L. L. Brewton Lumber Company, Inc., hereinafter referred to as "Brewton," instituted its suit in the state court. Continental filed a petition to remove and the matter was removed to the Federal Court. Continental

then answered, denying the allegations of Brewton's petition, asserting that Continental is the "holder and owner of a ninety-nine (99) year lease affecting the subject property" and that Brewton "by purchasing the subject property expressly subject to the lease held by the defendant, is estopped from attacking the validity of said lease." Continental's answer, Article 9.

The matter was submitted to and decided by the trial court on a stipulation of fact. The trial court in its original opinion ruled the language included in the sale to Brewton was for the purpose of limiting the warranty of the vendor to Brewton, and does not effect an estoppel against Brewton. It further ruled in its original opinion and opinion on remand that this was not a ninety-nine (99) year lease, but a nine (9) year lease with the right to extend or renew for additional periods of nine (9) years each. Appendix, Continental's petition, p. 18a.

Furthermore, in the reasons for judgment of the District Court, the Court succinctly identified the issue to be decided on remand:

> "Therefore, the issue now before this court is whether or not this is a valid rent or consideration under *Louisiana Law*." (Emphasis added.) Appendix, Continental's petition, p. 18a.

QUESTION PRESENTED BELOW

The issue presented in the Court for the Western District of Louisiana, Alexandria Division, and in the

Fifth Circuit Court of Appeal was a question of fact, to-wit:

> "Was the payment of real property taxes and local assessments by Continental on the property in question a valid rent or consideration under Louisiana Law?"

QUESTION PRESENTED HERE

The question presented to his Honorable Court is a question of fact, identical to the question presented below, to-wit:

> "Was the payment of real property taxes and local assessments by Continental on the property in question a valid rent or consideration under Louisiana Law?"

REASONS FOR DENYING WRIT

In opposition to Continental's stated reasons for granting the writ, the judgment heretofore rendered, affirmed, and rehearing denied will neither have far reaching effect, nor will it affect numerous leases throughout the State of Louisiana and United States. These reasons advanced by petitioner are not only unsupported by the evidentiary record, but, on the contrary, are completely refuted by the record.

The joint stipulation of fact entered into by Continental and Brewton contains the following stipulation in Article 25 thereof:

> "That counsel herein are not familiar with any other leases which contain the same terms, conditions and language of the lease under attack."

As the record verifies, this was a "wild" instrument, the likes of which counsel for both sides had never encountered.

It is readily conceded that this is an important case to Continental, and of course, it is an important case to Brewton. However, the issue decided herein is peculiar to the lease under attack and affects only the parties to this action.

The sole question here is whether a writ of certiorari should issue to the United States Court of Appeal for the Fifth Circuit, in order that this Court might decide whether on nothing more than the unique factual circumstances in this case — the trial court in the Western District of Louisiana, Alexandria Division, was correct in its interpretation of the factual situation.

There is no "federal question" involved in this case. Even if there were, this Court is not obligated to review it. Indeed, it is submitted that this Court's proper role is quite limited. Mr. Justice Frankfurter stated the situation thus:

> "When a case involves no general principal requiring pronouncement but merely its own unique circumstances — " A writ should not be granted. *Carter* v. *Atlanta & St. A.B.R. Co.*, 338 US 430, 438-439.

In the same opinion, referring to the particular case, Mr. Justice Frankfurter stated:

> "There is merely a difference in the application of professionally settled rules to the circumstances of this particular case — for me it is decisive that since the merits involved merely the evaluation of the unique facts in the record, this case does not fall within the proper business of the Court." *Id.*

In *Wilkerson* v. *McCarthy,* 336 US 53, 66-67 (1949), Mr. Justice Frankfurter again addressed the point:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases canvassed by two and sometimes three courts *even though those facts may have erroneously appraised.* The division in this Court would seem to demonstrate beyond per adventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances."

Referring to the Court's power to control its docket, he then says:

> "Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the

> operation of our federal system; *importance of the outcome merely to the parties is not enough.* It has been our practice to dismiss a writ of certiorari even after it was granted *where argument exposed a want of conflict or revealed that the case involved no more than its particular facts.*"

In support of his position, Mr. Justice Frankfurter cited the opinion of Chief Justice Taft speaking for a unanimous court in *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 236 US 387, 393, where the Chief Justice said that certiorari should *not be granted* —

> " — except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeal. THE PRESENT CASE CERTAINLY COMES UNDER NEITHER HEAD."

ARGUMENT NO. I

Louisiana law relating to the seriousness of consideration was and is not a novel question. Continental's argument no. I for granting the writ, contains the following statement:

> "Petitioner did not, and could not have foreseen at the time it sought removal of this action from the Louiiana District Court, Parish of Winn, to the United States District Court that the latter court would perceive such a purportedly unresolved question: that is, whether reimbursement by the lessee of property taxes and local assessments paid by the lessor may under any conditions constitute adequate consideration for a lease of real property ..."

Article five (5) of plaintiff's complaint alleges:

> "5.
>
> "(a) ...
>
> "(b) The extensions of the alleged lease under the terms of said instrument are not supported by any *rental* or other *consideration* whatsoever." (Emphasis added.)

Article five (5) of defendant's answer states:

> "5.
>
> "That in answer to the allegations contained in paragraph five (5) of the complaint, defendant specifically denies same."

Brewton has reviewed the pleadings in the record and finds no pleading heretofore filed by Continental relative to any motion to dismiss, or stay order on

the grounds of abstention. Petitioner was aware of the factual and legal issues presented in Brewton's complaint as evidenced by article five (5) of the complaint and answer, as well as the original opinion by the District Court and opinion of the Fifth Circuit Court of Appeal.

Continental chose its forum by virtue of their action to remove the case to the Federal District Court. It is respectfully submitted that Continental's argument that the District Court should have abstained from deciding the patent issues on removal is without merit.

ARGUMENT NO. II

Petitioner's argument that the form of the lease instrument herein was in common use in Louisiana is refuted by its own stipulation of fact number twenty-five (25).

The lease in question was only binding under Louisiana Law if the amount of the rent is serious, that is to say, the amount of rent cannot be out of all proportion to the value of the lease.

La. Civil Code art. 2464 (1870) reads in part:

> "Art. 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties.
>
> . . .

> "It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.
>
> "It ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

Article 2464 and the Doctrine of Serious Consideration applies to leases as well as sales. *Northeast Louisiana Detachment of Marine Corp League* v. *City of Monroe,* 253 So.2d 107 (La. App. 2d Cir. 1971).

The landmark decision in Louisiana on the Doctrine of Serious Consideration is *Murray* v. *Barnhart,* 117 La. 1023, 42 So. 489 (1906). In considering the validity of the lease before it, the Louisiana Supreme Court stated:

> "At common law the slightest consideration is sufficient to support the most onerous obligation. The inadequacies, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced. 9 Cyc. 365; A. & E. E. Bol. 6, T. 694. But under our law the consideration 'must be serious'; 'it must not be out of all proportion with the value of the thing.' Article 2464, Civ. Code. That article has special reference to the price of a sale, but the princi-

> pal it involves is not peculiar to sales. *It is a general principal of the civil law, and as old as the civil law itself.*" (Emphasis added.)

Another case involving the validity of a lease is *Northeast Louisiana Detachment of Marine Corp League* v. *City of Monroe*, 253 So.2d 107 (La. App. 2d Cir. 1971), when the Court of Appeal stated:

> "A lease is a synallagmatic contract by which one party gives to the other the enjoyment of a thing 'at a fixed price.' LSA Civil Code Article 2669. Three elements are essential to a valid lease — the thing, the price and the consent. LSA Civil Code Article 2670. Article 2671 provides that the price should be 'certain and determinate' and Article 2674 requires a 'certain stipulated price.' Article 2464 sets forth the essential elements of the price of a sale and requires that the price must be 'certain', 'fixed and determined' and, most significantly, 'serious' and 'not to be out of all proportion with the value of the thing'. The civil law doctrine embodied in Article 2464 applies to all other contracts as well as to sales. *Blanchard* v. *Huber*, 166 La. 1014, 118 So. 117 (1928)."

Additionally, the District Court in its well reasoned judgment made a factual determination that Continental's payment of not more than Two Thousand Seven Hundred Twenty-Eight and 48/100 Dollars ($2,728.48) in taxes during the nine (9) year renewal period beginning in 1968, when compared to the value of the lease

for the same period (One Hundred Seventy-Eight Thousand One Hundred Twenty Dollars [$178,120.00]) was simply not serious rental consideration as called for by Louisiana Law, (petitioner's appendix, p. 21a, 21b) and was out of all proportion to the value of the thing. La. Civil Code art. 2464 (1870).

ARGUMENT NO. III

Continental contends that the deed by which Brewton acquired the lands provides the conveyances made subject to "contract for sale and purchase of timber between Louisiana Development Company, Inc. and Mansfield Hardwood Company." (Continental's petition, p. 16, 17.) Continental further contends Brewton is estopped by the language from attacking the validity of this lease. The trial court rejected this contention.

At the outset, we note that the provision of Brewton's deed referred to above, does not mention any lease. A complete answer to Continental's plea of estoppel is found in *McDonald* v. *Richard*, 203 La. 155, 13 So.2d 712 (1943), in which Richard acquired an interest in a tract of land and subsequently sold Laux and Schuh a mineral interest in said lands. Richard then sold his interest in the land to Whitehead, who sold a one-fourth (1/4) interest to McDonald.

At the expiration of the mineral reservation of the vendors to Richard, McDonald filed suit claiming ownership of one-fourth (1/4) of the minerals. His claim was met by a plea of estoppel based on a declaration

in the deeds to McDonald and his vendor, Whitehead, that declared the property was purchased "subject to" the conveyance of mineral ownership to Laux and Schuh. In rejecting the plea of estoppel, the Louisiana Supreme Court said:

> "A sufficient reason why these clauses in the deed from Whitehead to McDonald cannot serve as an estoppel in this suit is that the pretended sales by Dr. Richard to Laux and Schuh were made before the declarations were made in the sales by Dr. Richard to Whitehead and by Whitehead to McDonald. And certainly these declarations in the sales by Dr. Richard to Whitehead and by Whitehead to McDonald were not made in the interest of Laux and Schuh, or their transferees, or for the benefit of anyone else but the parties who made the declarations, namely, Whitehead and McDonald.
>
> "Even if the declaration in the deed from Dr. Richard to Whitehead, dated September 9, 1936, referring to the deeds purporting to be sales of mineral rights by Dr. Richard to Laux and Schuh, should be deemed sufficiently specific to constitute an acknowledgment that the sales to Laux and Schuh were in fact made, *the acknowledgment would not bind either Whitehead or McDonald to recognize as valid the sales by Dr. Richard to Laux and Schuh.*" (Emphasis added.)

The McDonald case continues to be the law in Louisiana. See *Succession of Sonnier v. Bleu*, 208 So.2d 562, 567 (La. App. 3d Cir. 1968).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the well reasoned opinion of the District Court, as affirmed by the Appellate Court, in this instance reached the only fair and proper conclusion.

The facts in the case, as well as the law applicable thereto have been canvassed and reviewed by two (2) courts. Even though those facts may have been erroneously appraised (which respondent certainly does not concede) the outcome is of importance merely to the parties. No conflict between Courts of Appeal is involved and there is nothing here which is of importance to the public as distinguished from the parties.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing brief in opposition to petition for writ of certiorari has been served upon Continental Can Company, Inc. by mailing a copy of same, in the United States Mail, postage prepaid to Holloway, Baker, Culpepper, Brunson & Cooper, Attorneys at Law, Post Office Drawer E, Jonesboro, Louisiana 71251 and Wilkie, Farr & Gallagher, Attorneys at Law, 1 Chase Manhattan Plaza, New York, New York 10005, counsel of record for Continental Can Company, Inc.

Winnfield, Louisiana, this ____ day of November 1973.

CHARLES B. BICE